

**Danmor Company d/b/a Madison South Convalescent Center and Retail Clerks Union Local 1439, affiliated with the United Food and Commercial Workers International Union, AFL-CIO.** Cases 19-CA-11072, 19-CA-11128, and 19-CA-11173

March 11, 1982

### DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER

On April 9, 1980, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed an answer to the General Counsel's exceptions. On August 26, 1980, the Board issued an Order reopening the record and remanding<sup>1</sup> the proceeding to the Regional Director for further hearing. On June 16, 1981, Administrative Law Judge Jay R. Pollack issued the attached Supplemental Decision in this case. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Supplemental Decision, and to affirm the rul-

ings, findings,<sup>3</sup> and conclusions of the Decision<sup>4</sup> only to the extent not inconsistent with the Supplemental Decision.

### ORDER<sup>5</sup>

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Danmor Company d/b/a Madison South Convalescent Center, Spokane, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities or interests.

(b) Labeling employees as "union agitators" in response to prospective employers' reference checks.

(c) Discharging or otherwise discriminating against employees because of their union activities or interests.<sup>6</sup>

(d) Failing to replace licensed practical nurses, increasing its use of contract labor services, and refusing to consider job applicants for positions as licensed practical nurses, for the purpose of dissuading its employees from supporting the Union and/or for the purpose of dissipating the bargaining unit and undermining the Union's majority status.

(e) Refusing to hire job applicants in order to discourage employees from supporting the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

<sup>1</sup> On June 20, 1980, Administrative Law Judge Rasbury died. Accordingly, the case was assigned to another administrative law judge for further hearing.

<sup>2</sup> Respondent excepts to, among other things, the credibility rulings of Administrative Law Judge Pollack. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings, insofar as they are based on demeanor. However, in contested cases, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of evidence and the Board is not bound by the administrative law judge's findings of facts, but based its findings on a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Pollack's credibility findings are based on factors other than demeanor, and in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc.*, *supra*, we have independently examined the record in this case. We find there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

Administrative Law Judge Pollack, in sec. I.B, par. 3, of his Supplemental Decision, reciting an earlier finding of Administrative Law Judge Rasbury found that Johnson and Lyon were discharged in order to hide the unlawful discharges of Jarvis and Freeburger. In fact, Administrative Law Judge Rasbury found that Jarvis and Freeburger were discharged to hide the unlawful discharges of Johnson and Lyon.

Administrative Law Judge Pollack inadvertently stated that Carol Palmer applied for work on January 4, 1980, rather than the correct year of 1979.

<sup>3</sup> We note that no exceptions were filed to Administrative Law Judge Rasbury's dismissal of the complaint allegation that employees were unlawfully denied union representation during a disciplinary session.

<sup>4</sup> The case was remanded on the issues of whether Respondent violated Sec. 8(a)(3) and (5) of the Act by failing to fill vacant unit positions with licensed practical nurse applicants in an attempt to dissipate the unit, contracting out unit work to undermine the Union's majority, and by failing and refusing to hire 13 allegedly qualified named applicants for unit positions.

Due to Administrative Law Judge Pollack's conclusion in his Supplemental Decision that Respondent did intentionally and unlawfully dissipate the unit, we do not adopt Administrative Law Judge Rasbury's dismissal of this part of the complaint.

<sup>5</sup> We set forth the pertinent provisions of the Order of Administrative Law Judge Rasbury's Decision and the Order of Administrative Law Judge Pollack's Supplemental Decision as one Order for purposes of simplification and ease of understanding.

<sup>6</sup> Administrative Law Judge Rasbury stated, in sec. V, 5, of his Decision, that Respondent had violated the Act "[b]y discharging and refusing to reinstate Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger because of their union activities." Judy Jarvis and Glenda Freeburger were not discharged for their union activities. Rather, they were discharged in order to hide the unlawful discharges of Johnson and Lyon. We note and correct this error.

(a) Offer to Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed.

(b) Make Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger whole for any loss of earnings each of them respectively may have suffered by reason of Respondent's unlawful discrimination against them in the manner set forth in that section of the Decision entitled "The Remedy."

(c) Make Frances L. Frederick, Beverly Ann Riley, June K. Zimmerman, Russell K. Goo, Patty Ann Colbert, Carol Palmer, Vicky Renee Mostul, Jacquelyne Jean Tilton, Pamela Jowleen Rowberry, Theodore Q. Blasingame, and Teresa J. Blasingame whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner and to the extent set forth in the section of the Supplemental Decision entitled "The Remedy."

(d) Offer the above-named employees immediate employment, subject to the conditions and limitations set forth in the section of this Decision and Supplemental Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and reinstatement rights as set forth in "The Remedy" section of the Decision and the Supplemental Decision.

(f) Post at its Spokane, Washington, facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and hereby is, dismissed insofar as it alleges an unlawful refusal to hire John Eugene Storment and Shirley Kathleen Tock.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in activities on behalf of any union.

WE WILL NOT interrogate employees concerning their and/or their fellow employees' union activities.

WE WILL NOT interfere with employees' Section 7 rights by referring to them as "union agitators" in response to reference checks from prospective employers.

WE WILL NOT fail to replace licensed practical nurses, increase our use of contract labor services, or refuse to consider job applicants for positions as licensed practical nurses, for the purpose of dissuading our employees from supporting Retail Clerks Union 1439 and/or for the purpose of dissipating the bargaining unit and undermining the Union's majority status.

WE WILL NOT refuse to hire job applicants in order to discourage employees from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger immediate

<sup>7</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings, plus interest.

WE WILL make Frances L. Frederick, Beverly Ann Riley, June K. Zimmerman, Russell K. Goo, Patty Ann Colbert, Carol Palmer, Vicky Renee Mostul, Jacquelyne Jean Tilton, Pamela Joleen Rowberry, Theodore Q. Blasingame, and Teresa J. Blasingame whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner and to the extent set forth in the section of the Supplemental Decision entitled "The Remedy."

WE WILL offer the above-named employees immediate employment, subject to the conditions and limitations set forth in the section of this Decision and Supplemental Decision entitled "The Remedy."

The Union is the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and part-time licensed practical nurses and graduate practical nurses employed by the Danmor Company at the Madison South Convalescent Center, but excluding all registered nurses, nursing assistants, dietary and housekeeping employees, physical therapy aides, laundry employees, maintenance employees, office clerical employees, professional employees, administrators, managers, confidential employees, guards and supervisors as defined in the Act.

**DANMOR COMPANY D/B/A MADISON  
SOUTH CONVALESCENT CENTER**

**DECISION**

**STATEMENT OF THE CASE**

JAMES T. RASBURY, Administrative Law Judge: This case was heard by me in Spokane, Washington, on September 18 through 21, 1979.<sup>1</sup> A charge was filed by Retail Clerks Union Local 1439, affiliated with the United Food and Commercial Workers International Union, AFL-CIO (hereinafter called the Union), against Danmor Company d/b/a Madison South Convalescent Center (hereinafter called Respondent) in Case 19-CA-11072. Additional charges were filed on February 16, 1979, by the Union against Respondent in Case 19-CA-11128. Thereafter, an order consolidating cases, consoli-

<sup>1</sup> The relevant and significant events, set forth hereinafter, occurred during the period from April 1978 through January 1979. Unless otherwise indicated, all dates hereinafter shall refer to this timeframe.

dated complaint and notice of hearing issued on March 15, 1979. New charges were filed by the Union on March 5, 1979, against Respondent in Case 19-CA-11173, following which a consolidated complaint and notice of hearing which incorporated all of the above-mentioned charges was issued on April 19, 1979. Additional amendments were granted at this hearing.<sup>2</sup> The consolidated complaint alleges that Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended (hereinafter called the Act), by contracting out work, by calculating a course of conduct designed to dissipate the unit, and by refusing to hire qualified applicants. The discharge of four employees is alleged to be violative of Section 8(a)(3) of the Act and there are three specific acts alleged to be violative of Section 8(a)(1) of the Act—namely, interrogation, labeling of a former employee as a "union agitator," and denying employees union representation at a disciplinary conference after a request for such representation had been made.

Upon the entire record, including my observation of the demeanor of the witnesses and after giving due consideration to the briefs filed by the General Counsel and the Respondent, I hereby make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is a State of Washington corporation engaged in the business of operating convalescent centers in Spokane, Washington, and other locations. During the past 12 months it grossed in excess of \$500,000 for performance of its services and during the same period purchased and caused to be transferred and delivered to its facilities within the State of Washington, goods and materials valued in excess of \$50,000 directly from sources outside said State, or from suppliers within said State which, in turn, obtained said goods and materials directly from sources outside said State. Respondent admits, and I herewith find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION**

Respondent admits, and I herewith find, the Union to be, and at all times material herein to have been, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Background**

On May 8, 1978, the Union filed a representation petition seeking an election among Respondent's service and maintenance employees which included nurses aides and

<sup>2</sup> At my request and with the agreement of all the parties, the General Counsel filed a late exhibit which incorporated all of the aforementioned consolidated complaints, amended charge, and oral amendments to the complaint and appears in the formal file as G.C. Exh. 8. Counsel for both Respondent and the Charging Party acknowledged the exhibit as a true and accurate compilation of the aforementioned consolidated complaints and amendments.

orderlies. On June 27, 1978, an election was held, which resulted in objections to the election filed by the Union. A second election in said unit is blocked pending the outcome of the instant proceeding. On May 15 the Union filed a petition in Case 19-RC-8892, seeking to represent Respondent's employees in the following described unit:

All full-time and part-time licensed practical nurses and graduate practical nurses employed by Danmor Company at the Madison South Convalescent Center, but excluding all registered nurses, nursing assistants, dietary and housekeeping employees, physical therapy aides, laundry employees, maintenance employees, office clerical employees, professional employees, administrators, managers, confidential employees, guards and supervisors as defined in the Act.

On August 16 the Regional Director for Region 19 certified the Union as the exclusive representative of Respondent's employees in the heretofore described bargaining unit, which I now find to be an appropriate unit within the meaning of Section 9(b) of the Act. Collective-bargaining negotiations in an effort to reach a collective-bargaining contract covering the licensed practical nurses' bargaining unit heretofore described (hereinafter LPN unit) commenced on October 24 and have continued at least through the end of January 1979. Two of the alleged discriminatory discharges—Marcy Lyon and Judy Johnson—served as employee representatives on the Union's bargaining committee.

Testimony principally set forth by employees Donald Nelson and Trudel Dean clearly established the following named employees to have occupied key supervisory or managerial positions with Respondent as follows:

T. D. Mortimer—President

T. D. Mortimer—Operations Manager<sup>3</sup>

Grace Ellis—In-Service Instructor at Madison South from October 1976 until July 1978, and from July until February 1979 Director of Nursing Services

Donald Nelson—Administrator at Madison South since October 1978

Elizabeth Dillingham—Administrator at Madison North but formerly employed as Administrator at Madison South immediately before Nelson assumed the position

Betty Ellis—In-Service Director for Madison South from May 1978 until mid-January 1979;

Betty Heinje—In-Service Director for Madison South immediately following the resignation of Betty Ellis in mid-January 1979.

There is no conflict in the evidence that the heretofore named individuals in this paragraph had authority in the interest of Respondent to hire, fire, reward, or discipline other employees and I herewith find each of them to have been at all times critical to their participation in the events hereinafter to be discussed supervisors and agents

of Respondent within the meaning of Section 2(11) and (13) of the Act.

## B. The Evidence

### 1. Regarding the 8(a)(1) allegations

Grace Ellis, the director of nursing services during most of the critical period with which we are here concerned, was called by the General Counsel and testified extensively but was not cross-examined by Respondent's counsel, nor was she called by Respondent in the presentation of its case. Grace Ellis was charged with violating Section 8(a)(1) of the Act by interrogating an employee on or about September 8, 1978, concerning the employee's and other employees' union or protected concerted activities. In the course of Glenda Freeburger's testimony, she stated that the following occurred "about the middle of September," 1978.

I just went in [Grace Ellis' office] and asked her if I could have a week off to go down to Florida and see my son. And we discussed that for a little while. And then she pointed to a newsletter she had, and she told me she was very disappointed in me. And I just asked her why. And she says, "Well, all this union activity that's going on," she said, "I've got two employees left and it looks like they're both giving me the run around." And I didn't understand what she meant, so I asked her and she said, "Well, you know about the union meetings?" And I said, "What union meetings?" And she said, "You're supposed to have a union meeting over at Perkins." And I told her, I said, "I didn't know nothing about it, and if I did, I wouldn't squeal on my fellow employees."

When asked if there was anything else said at that time Freeburger replied, "She just told me she was very disappointed in me."

Respondent is further charged with violating Section 8(a)(1) of the Act in that Grace Ellis gave Glenda Freeburger a "poor employment recommendation" because she had engaged in union and/or protected concerted activities. In this connection, Virginia Garrity, a personnel clerk with St. Joseph's Care Center, testified that in connection with an employment application filed by Glenda Freeburger with St. Joseph's Care Center that she contacted Grace Ellis in connection with a routine inquiry of former employers. According to Garrity, "Mrs. Ellis told me that she was a very good worker. She was very kind to the patients and the patients liked her very much. She said that Glenda is very loud and that they had—she had a big mouth and they had counseled her that she wasn't out in the street, to be more quiet. And they said that she was a union agitator." When asked by the Administrative Law Judge to reflect on her answer and be certain that "union agitator" were the words used by Grace Ellis, the witness responded, "Yes, she did." When Grace Ellis was questioned by the General Counsel as to what she (Grace Ellis) might have stated to any prospective employer inquiring concerning Glenda Freeburger, she was extremely vague as to any specific inci-

<sup>3</sup> Harry Rogers assumed the position of operations manager for Respondent in May 1979; however, Trudel Dean has continued as comptroller of Respondent

dent or inquiry. When Ellis was asked specifically if she had told anybody that she (Freeburger) was a union agitator, Ellis replied, "The only thing I could have answered is she was prounion and that would have been all, but not that she was an agitator because she was not." Garrity further testified that Ellis had asked her, "if this could be kept confidential, and I promised her I would do this."

Respondent, acting by its agent Don Nelson, is further alleged to have violated Section 8(a)(1) of the Act by denying employees Judy Johnson and Marcy Lyon union representation at a disciplinary meeting, even though union representation was requested by both Lyon and Johnson. The facts of this incident are not in serious dispute.

Marcy Lyon testified that, on January 4 at approximately 2:30 p.m., she was told by Unit Coordinator Beth Gaines that she wished to talk to her. They went into the charge nurse's office at which time Beth Gaines pulled out a counseling form. When Lyon saw the counseling form she told Gaines that she would like to call her union representative, and did so. At that time Donald Nelson came into the charge nurse's office and inquired as to what the trouble was. Lyon responded, "Beth has given me a counseling form, and I called my union representative." At that time Nelson advised Lyon that she was not entitled to union representation. At that moment Judy Johnson appeared in the charge nurse's office and asked if she was to be included in on this. Nelson invited her in and Lyon informed Johnson of the phone call to Katz, the union representative. At that moment Lyon was paged on the intercom system, but Nelson asked her to stay there and he would take care of it.<sup>4</sup> When Nelson returned to the charge nurse's office, Judy Johnson asked him if the counseling form was going to result in disciplinary action. According to her testimony, Nelson indicated that it was and she asked for union representation, which Nelson denied, stating employees were not entitled to union representation in the absence of a union contract. Nelson, Gaines, and Johnson then proceeded to Nelson's office where Johnson was given her counseling form. The forms for both Lyon and Johnson had been prepared prior to the meeting and no changes were made in their content. She was given an opportunity to write her comments on it. She signed it, Gaines signed it, and then Johnson left the office.

Katz testified that on January 10 at a collective-bargaining session the disciplinary issue was discussed, at which time Nelson acknowledged that he had informed the girls that it was a disciplinary session. Moreover, Grace Ellis testified that the written counseling forms are used as a basis for progressively disciplining employees and that employees can and have been discharged for receiving too many counseling forms. Nelson did not dispute the facts as generally related to by Lyon and John-

son concerning this incident and specifically did not deny the testimony of either Katz or Johnson that he (Nelson) had referred to this "counseling session" as a "disciplinary session."

## 2. The incident leading to the discharges of Judy Jarvis and Glenda Freeburger

Judy Jarvis and Glenda Freeburger were both nurses aides working on the first floor on January 24. Freeburger was employed on April 4 and Jarvis in October. The testimony of the three witnesses who testified regarding what was said—Jarvis, Freeburger, and Divine—differed slightly, but is of no material significance because Respondent presented no accurate version of *what* was said and based its reasons for the discharges on the employees' loud tone which it claimed was disturbing to the patients and on the anger or inability of the employees involved to get along. According to Jarvis, who had to leave early that day because of an appointment, she passed Freeburger in the hall while both were engaged in passing out the trays during the luncheon hour and called out Freeburger. Freeburger replied, "Just a minute." Jarvis then asked her if she would pick up her I's and O's (I's and O's stand for input and output which had to do with the charting procedure of patients). Freeburger responded, "What did you say?" And Jarvis, who was passing on down the hall delivering her tray replied, "I'll catch you when I get back." According to Jarvis, she was probably as much as 30 feet away from Freeburger during the exchange. Freeburger's account of the exchange was very similar to that of Jarvis; however, Freeburger testified that she had replied, "[A]ll right, I will, if I've got time at the end of the day." Freeburger's reply was apparently not heard by Jarvis or Divine, because Divine approached Jarvis immediately thereafter and said that she would pick up the I's and O's. Neither Jarvis nor Freeburger regarded the exchange as being unusual or excessively loud, and they were good friends at the time and have remained good friends since the incident. Sue Divine, a registered nurse and a team leader, generally confirmed the testimony of Jarvis and Freeburger and further testified that the girls were speaking in a normal speaking voice. During the exchange, Divine was seated at the nurses station performing charting.

When questioned as to what happened after the exchange between Jarvis and Johnson, Divine replied, "Trudel Dean was standing at the end of the counter at the nurses station, and she turned to me and asked if I was going to do anything about it, and I didn't know what she was referring to, and she made a gesture that directed my attention to Judy and Glenda, and I got up and went to Judy and I said I would take her 'I's' and 'O's' for her and she said, no, she'd make time and make sure she had it done before she left." Divine further testified that Trudel Dean did not inquire as to the girls' names nor did she appear visibly upset. Divine testified that she was never asked by anyone in management what she may have heard or seen in connection with the exchange.

<sup>4</sup> Katz testified that he caused Lyon to be paged over the intercom upon his arrival at the convalescent center in response to Lyon's call. Nelson appeared in response to the Lyon page and, when Katz informed him of the purpose of his visit, Nelson asked him to call Grabicki. Respondent's counsel. Grabicki informed Katz that the women were not entitled to union representation since it was a "counseling" rather than a disciplinary interview, and refused to permit participation by Katz. Katz then left the facility.

Trudel Dean was unable to recall any of the conversation between the two nursing assistants involved, but testified that, after speaking to Charge Nurse Sue Divine, she "literally ran upstairs and went into the administrator's office. Mr. Grabicki was there and Mr. Nelson was there and I told them that there was another shouting match going on downstairs and that something needed to be done right away about that." According to Dean, she returned to the first floor and there observed Grace Ellis "going down the hall with one of the people involved."

Grace Ellis' testimony was extremely vague regarding the incident. She could not remember who had first informed her of the incident; the nature of the fight or argument; how she had learned that it was Judy Jarvis and Glenda Freeburger who were involved; and the extent of her investigation or just what she may or may not have said to either of the individuals involved. She thought that she had made the decision that they should be discharged, but she acknowledged that she had not reviewed their personnel files before the discharge.

Nelson's testimony was equally unspecific but again he thought, "between my attorney and myself and Trudel Dean we discussed the implications of taking any action on all individuals concerned" including "Sue Divine, and the two nursing assistants, Glenda Freeburger and Judy Jarvis." This was in contrast to Grace Ellis' testimony that she made the decision to discharge the two nursing assistants.

### 3. The discharges of Judy Johnson and Marcy Lyon

Judy Johnson was an LPN who had been hired at Madison South Convalescent Center in January 1976, and Marcy Lyon, an LPN, hired on May 11, 1978. Johnson was active in the Union's organizational campaign and both Johnson and Lyon were members of the negotiating committee after the Union was successful in winning the election in the LPN unit. The incident giving rise to their discharge on January 24 occurred on the day before. Johnson, who had just returned to work after an illness which had lasted several weeks, was the only LPN assigned to the first floor and had been caring for a patient that day who was in critical condition and not expected to live. Unknown to Johnson, Lyon had been assigned to "catch up" on all the charting and had been so engaged for about 2 weeks. As Johnson entered the charge nurse's office where Lyon and Divine were seated, Lyon asked Johnson to remember and chart on Tabert, the critically ill patient. Johnson replied, "I always do my charting," and with that she turned and left the room. As Johnson passed outside the door, she overheard Lyon tell Sue Divine that she was "God damn sick and tired of doing all the charting." Lyon, apparently realizing that her remark to Divine had been overheard, sought Johnson out in the medication room and told her, "Judy, look, I'm tired. I've been doing all the charting. We were told in a meeting that we would be fired if we did not keep it up." Johnson explained that she had been helping Dr. Van Veen and that one of her patients was dying. Lyon tried to explain that she had not intended to imply that Johnson was not working. When Johnson offered to do some of the charting, Lyon declined stating that she had been instructed to do it her-

self. At the end of the exchange, in apparent response to Johnson's expressed desire just to be left alone, Lyon uttered an obscene expression and walked out of the room. At that point Betty Heinje, the in-service director, approached the two women and, in an apparent attempt to relieve the tensions told them, "Look girls, I know you're up tight from all these people being here in the facility. We're all up tight getting ready for this inspection. Marcy, you've worked 11 days in a row, you're tired. Judy, I know you don't feel well. Let's just forget it. Everything will be all right." Lyon testified that Betty Heinje, Betty Owens, a ward secretary, and Liz Walker, a ward secretary, were the only other employees within hearing distance and that the nearest patient was approximately 50 feet away.

Divine testified that she had been working with Marcy Lyon at the nurses station during the initial exchange, but that she had not been able to hear the conversation that occurred in the medication room, although she described it as being only a short distance away. "Well, the nurse's station is at the intersection of the two halls, patient care and patient rooms, and the conference is kind of around the corner down one end of the hall. It's just around the corner. It's a separate little room." On further questioning she explained that the medication room was probably about 25 feet away from the nurses station. Testimony from other witnesses indicated that there was no door to the medication room.

The following morning Lyon and Johnson apologized to each other for their behavior on the previous day. At approximately 2:30 on January 24, Lyon was called into Grace Ellis' office and was informed by Donald Nelson that she was being discharged for fighting. Lyon was not given an opportunity to explain what had happened the day before and, despite her protestations, Nelson told her that she had been previously warned and counseled several times before and that "it'll all come out at the hearing." Johnson had left work early in order to assist employee Liz Walker with an emergency concerning Walker's daughter and she was advised by Nelson telephonically that she too had been fired. Johnson was neither asked to explain nor given an opportunity to explain what had occurred.

Trudel Dean testified that she was first informed of the incident in a discussion with Barbara Barton, a supervisor from the Respondent's Yakima facility who was temporarily at Madison South, who informed her that, "Marcy Lyon and Judy Johnson had a very loud argument downstairs," that a verbal confrontation had taken place in back of the nurse's station, that Lyon had complained about Johnson's job performance, that Lyon was upset with Johnson, and that she (Barton) had advised the employees to work it out. Dean testified that she relayed this information to Nelson and recommended that the women involved be terminated. According to Dean, Nelson replied that he would consult with Grace Ellis, that the attorney would have to be consulted, and that there had been previous incidents of arguments between the two individuals. Dean testified that later that afternoon she had called Respondent's attorney, Grabicki, and that Grabicki, Nelson, and possibly Grace Ellis had

discussed the situation and "the decision was made that we had people who did not conduct themselves according to our policies. They were infringing on patient's rights. They were arguing among each other, and that they be discharged." However, despite repeated requests by counsel, Dean was unable to relate any specific statements that were made by any of the participants and there is no indication that anyone else was consulted other than possibly Barbara Barton.

Donald Nelson's account of the incident was far from precise and was lacking in detail and specificity even after having been cautioned by the court that he was not being very specific and that this was his opportunity to articulate his version of the incident. He stated that it was probably Grace Ellis and Betty Heinje who had reported to him, "We had an altercation down there. A physician has told us about it." Nelson related that he was told that "an altercation had happened at the nursing station on first floor . . . and they were talking to each other quite loudly in fact, almost to the point of shouting." When pressed as to who had reported this information, Nelson was unable to answer specifically and replied, "Well, the people reported to me. Yes, that's what I was told." Nelson recalled that there was a meeting on January 24 with Grabicki and Trudel Dean wherein it was decided to investigate the situation. When questioned as to what investigation had taken place before the decision to discharge was reached, Nelson replied that a physician (Dr. Van Veen) was interviewed as well as all personnel in the area. Later, Nelson recanted and admitted that Dr. Van Veen may have been interviewed for the first time after the women were discharged. (A file memorandum in Lyon's personnel file indicates that there was a telephone conversation between Dillingham and Dr. Van Veen on January 24 at 5 p.m.—which would have been after the women involved were notified of their discharge—indicating that Van Veen had "heard some nurses arguing in first floor . . . on January 23, 1979. He heard something about . . ." Nelson first testified that he had interviewed Barbara Barton and Barbara Townsend on January 24 in the presence of Grabicki, but later corrected his testimony to state that he had obtained written reports from Townsend and Barton on the afternoon of January 23. (The written statements of Townsend and Barton were never produced at the hearing and neither Townsend nor Barton, although still in the employment of Respondent at facilities other than the Madison South, was called to testify.) While Dean was of the opinion that the decision to terminate Johnson and Lyon had been made on January 23, Nelson was of the opinion that the decision had not been made until on the afternoon of January 24.

Grace Ellis testified that her first knowledge of the January 23 incident came in a meeting attended by Grabicki, Nelson, and Dean shortly after the luncheon hour on January 24. At that time she learned Johnson and Lyon had been "fighting in the unit" and that they had previously been counseled on a similar situation and it was decided that they should be discharged. Ellis testified that after the decision she and Nelson walked out of the main office into her office where they paged Marcy Lyon and informed her that she was being terminated.

Ellis stated that Nelson did the talking and that she did not participate in the conversation. There is no indication that either Marcy Lyon or Judy Johnson was given an opportunity to explain what had actually occurred.

Respondent also contends that both Johnson and Lyon had previously been counseled and the January 23 incident was merely the culmination of their unsatisfactory performance. The January 4 counseling incident which both Johnson and Lyon received has heretofore been related in connection with the failure of Respondent to permit the employees to have union representation. This counseling form stemmed from criticism by Beth Gaines, a charge nurse under whom Lyon and Johnson worked as LPNs, and appears to have been a response by Gaines because both Lyon and Johnson had been critical of Gaines and her inability to handle her job, and this criticism had been reported on several occasions to representatives of management. According to the testimony of Lyon,—which was not disputed by Betty Ellis, one of the management representatives to whom the LPN's had complained—Betty Ellis, "asked Judy and myself had anything improved on the floor. And we had to honestly tell her, 'no, it had not.' And she said, 'Well, I have been working with Beth, and to be honest with you, I must agree with you, that she's not able to handle it.'" Although Betty Ellis testified on behalf of Respondent, she did not deny having made such a remark to Johnson and Lyon regarding Beth Gaines.

There was also an incident in June 1978 which resulted in a verbal counseling by Administrator Elizabeth Dillingham for employees Lyon, Johnson, and Connie Gillespie (see Resp. Exhs. 7 and 10, and the brief type-written counseling form dated June 29, contained therein). This incident apparently stemmed from a conversation in the charge nurse's office on the first floor during which Marcy Lyon was complaining to Judy Johnson because she felt the Union had not worked hard enough to win the election in the service and maintenance unit. (The election in that unit had just been lost a few days before.) The testimony supports the fact that Lyon talked rather loud during the discussion, but it was relatively brief when Johnson walked away and refused to be further involved. So far as can be determined, Connie Gillespie did not participate. However, all three employees were reported to Dillingham by Betty Ellis and each received the verbal counseling as noted in their personnel files. There is nothing in the counseling form to indicate that the employees were informed that a repetition of the incident would result in discharge.<sup>5</sup>

##### 5. Respondent's failure to hire LPNs

The General Counsel contends that Respondent deliberately failed to hire and/or replace LPNs following the certification of the licensed practical nurses' unit. This

<sup>5</sup> There was an additional incident concerning Judy Johnson and a nurses aide named Rita Pasquini, about which there was considerable testimony. However, because this incident was not listed or given as a reason by Respondent for the discharge of Johnson, I have not deemed it sufficiently relevant to the issues to be set forth in great detail. However, if the testimony of Johnson and Larry Bavuso is to be accepted at face value, then it would appear that Respondent was seeking to "frame" some form of justifiable basis to get rid of Johnson.

she contends was done for reasons proscribed by the Act and with the intention of deliberately dissipating the unit in an effort to rid itself of the Union. To support this allegation she presented undeniable evidence that the number of LPNs declined from eight in May 1978 to two—each of whom was on a leave of absence—in January 1979. However by the summer of 1979 there were four LPNs on the payroll. The General Counsel also presented the application forms for 13 applicants who applied for positions with Respondent during the period from September 26 through February 9, 1979. (See G.C. Exhs. 3a through 3m).<sup>6</sup>

Additionally, the General Counsel points to the testimony of Larry Buchanan, a former nurse aide employed by Respondent, who testified to three conversations he engaged in with Grace Ellis. According to Buchanan, the first conversation occurred just prior to the election in the LPN unit at which time Buchanan asked Ellis if she were going to replace the two LPNs who had recently resigned. According to Buchanan, Ellis responded by saying that sort of thing was out of her hands, that it was not her responsibility, and that she had nothing to say about it. According to Buchanan, the next conversation with Ellis occurred toward the end of September. This conversation concerned an LPN named Ruth Jones who had just been discharged by Respondent for sleeping on the job. According to Buchanan, the telephone conversation occurred, "I suppose now you are going to find an LPN to replace her with?" Grace said, "Probably not. I don't know, I don't think so." I said, "Well now, we've got a very interesting situation don't we? We're down to four, we're down to four LPN's where there used to be eight. And it's really getting down to the wire, because Denise is pregnant, you know she will be leaving, and there is every probability that Connie will be leaving. That will leave two. That isn't much of a unit." She agreed that it was not much of a unit. The next conversation between Buchanan and Ellis occurred when he called and asked her if he could return to work and she replied, "Absolutely not." When Buchanan stated, "Why not? You have openings and I'm a good aide, you know that." Ellis then replied, "That's not the question."<sup>7</sup> According to Buchanan, when he filled out the application and presented it to Ellis, she stated, "You know I can't hire you. I've gotten instructions. I cannot hire you." When he inquired as to who had given the instructions Ellis replied, "I'll give you three guesses." When Buchanan guessed Mortimer, Ellis replied, "You've got it." With that they both laughed and Buchanan told her, "I heard about Judy and Marcy, and as

far as I'm concerned you're in for the time of your lives." Buchanan testified that Ellis replied, "I know it. I think it's a horrible mistake, but I didn't have anything to do with it. That's all Mr. Nelson, and I really don't have anything to say about anything around here anymore."

## Analysis and Conclusions

### 1. The 8(a)(1) allegations

As has been noted earlier herein, an election had been held in the service and maintenance unit which would have included Glenda Freeburger's classification. In September when the alleged conversation between Freeburger and Grace Ellis occurred, the parties were awaiting the outcome of the unfair labor practice in order to resolve the question of when to hold a new election. The testimony of Glenda Freeburger regarding Grace Ellis' efforts to seek her out regarding union activity among the employees stands unrefuted in the record. As related by Freeburger, there were no direct inquiries by Ellis, however, the subtleness was not missed by Freeburger otherwise she would never have replied, "I didn't know nothing about it, and if I did, I wouldn't squeal on my fellow employees." Such subtleness betrays Respondent's efforts to obtain information regarding the employees' union activities and as such interfered with, restrained, and tended to coerce the employees in the exercise of their Section 7 rights. Respondent's argument that this allegation is barred by Section 10(b) of the Act is erroneous. The interrogation occurred in mid-September. The charge relating specifically to the wrongful discharge of Freeburger and Jarvis was filed on February 16, 1979 (well within the 6 months time limitation). The complaint need not be restricted to the precise allegations of the charge. So long as there is a timely charge the complaint may allege any matter closely related to or growing out of the charged conduct, or related to the controversy which produced the charge, or which relates back to or defines the charge more precisely.<sup>8</sup> I shall find that Respondent—through the conduct of its supervisor, Grace Ellis—wrongfully sought information from Glenda Freeburger in violation of Section 8(a)(1) of the Act.

Virginia Garrity testified that Grace Ellis had labeled Glenda Freeburger as a "union agitator" when she (Garrity) called Madison South to obtain a reference check on Freeburger. Such labeling of employees would have a natural tendency to impede and interfere with an applicant's employment opportunities. Such interference amounts to blacklisting and has been held by the Board to be a violation of Section 8(a)(1) of the Act. I shall find Respondent to have interfered with, coerced, and restrained Freeburger in the exercise of her Section 7 rights when Grace Ellis told Virginia Garrity of St. Joseph Care Center that Freeburger was a union agitator. See *Steere Broadcasting Corporation*, 158 NLRB 487, 496 (1966).

<sup>6</sup> The General Counsel was prepared to present the testimony of each of these applicants concerning the fact that they had applied for positions as licensed practical nurses with Respondent. However, after receiving the testimony of four of these witnesses—i.e., Vickie Mostul, Beverly Riley, Francis Frederick, and Theodore Blasingame—further testimony from other applicants was denied on the basis that it would be cumulative and that nothing further would be gained inasmuch as the application of all 13 prospective employees had been received in evidence. The General Counsel made an offer of proof as to what each of the remaining applicants would have testified to if permitted to testify, which appears in the record beginning on l. 24, p. 619, through l. 23, p. 622.

<sup>7</sup> Buchanan had resigned on October 31 in order to go into business for himself but had found it more difficult than expected and wanted to return to work.

<sup>8</sup> *N.L.R.B. v. Funt Milling Company*, 360 U.S. 301 (1959); *National License Company v. N.L.R.B.*, 309 U.S. 350 (1940); and *N.L.R.B. v. Kohler Company*, 220 F.2d 3 (7th Cir. 1955).

The evidence is clear and unchallenged that, on January 4 when Gaines and Nelson sought to present Judy Johnson and Marcy Lyon with derogatory counseling forms, they were apprised that it was a disciplinary session. However, the counseling forms had been prepared in advance and the employees were rather routinely handed the forms and given an opportunity to express their version of the incident or note their comments on the forms. There is no evidence to indicate that this was an investigatory session.

In two rather recent decisions,<sup>9</sup> the Board appears to have distinguished between an investigatory interview that may lead to disciplinary action and an interview where the disciplinary action to be taken is a *fait accompli* and the employer is merely informing the employee of his or her "shortcomings" and the action taken by the employer. As the Board said in the *Texaco* case, *supra*:

It is clear on the record before us that, at a time prior to the meetings here in question, Respondent had decided to take specific disciplinary action against the five employees in this case. Moreover, it is clear from a reading of each of the letters mentioned above that Respondent intended to and did treat both the written notice of disciplinary action and the meetings during which they were tendered as intrical parts of the disciplinary process. Likewise, the uncontroverted evidence herein demonstrates that no defense offered by the employees who were summoned to the aforesaid meetings, or by any representative speaking in their behalf, would have deterred Respondent from its disciplinary decisions.

There is no evidence that Respondent needed or desired to obtain admissions of misconduct by the employees disciplined, nor can such a purpose be inferred from the evidence. As previously mentioned, the Administrative Law Judge concluded that all employees were afforded an opportunity to explain or defend themselves. This offer, however, was not designed to obtain information to support Respondent's discipline. Rather, it constituted an essential part of the communication process during which an effort was made by Respondent to determine whether the employees understood the reasons for disciplinary action, their concurrence therewith aside. Whether called "counseling" as Respondent urges, or by some other term, such conduct does not demonstrate, nor are we persuaded, that Respondent went beyond the parameters established in our *Baton Rouge* decision so as to warrant the protection accorded employees by *Weingarten*.

Accordingly, we hold that the employees in this case were not entitled to representation at the disciplinary meetings here in question, and, therefore, that Respondent did not violate the Act by compelling their presence at those meetings without benefit of the representation they requested.

<sup>9</sup> *Baton Rouge Water Works Company*, 246 NLRB 995 (1979); and *Texaco, Inc.*, 246 NLRB 1021, 1022 (1979).

The facts of the instant case would appear to be identical to those with which the Board was concerned in the *Texaco* case, *supra*, and I shall accordingly dismiss this aspect of the complaint.

## 2. The 8(a)(3) allegations

The Respondent defends its actions of discharging Judy Johnson and Marcy Lyon on the employees' violation of one of the rules listed as a dischargeable offense in the personnel policies booklet. (Resp. Exh. 5 at pp. 28 and 29.) The specific rule involved was No. 18—"Fighting or Other Evidence of Inability to Cooperate with Fellow Employees." (See termination forms contained in Resp. Exh. 7—personnel file of Marcy Lyon—and Resp. Exh. 10—personnel file of Judy Johnson.) Yet much of the vague, indefinite, unspecific testimony of Respondent's witnesses was concerned with the "patients' rights" having been violated.<sup>10</sup>

The testimony of Respondent's witnesses regarding the investigation of the incident between Johnson and Lyon was confusing and not convincing.

Dean first testified that she learned from Barbara Barton that "Marcy Lyon and Judy Johnson had a very loud argument downstairs." According to Dean she related this to Nelson and commented that it was "an infringement of patients' rights," but failed to explain which patients, if any, had heard the argument or how she had come by such knowledge when there was no indication that Barton had made such a report to her. Dean contended that the decision to terminate Johnson and Lyon was made on January 23 at a meeting among Dean, Nelson, and "possibly" Grace Ellis. Nevertheless, according to Dean, Grabicki, Respondent's attorney, spent considerable time in the facility on January 24 "talking to employees who overheard the confrontation." However, Liz Walker, the ward secretary, and Betty Heinje, the in-service director, each testified that they did not speak to anyone from management concerning the incident until after Lyon and Johnson had been discharged.

Nelson's testimony was equally lacking in specificity and clarity. Nelson testified that it was probably Grace Ellis or Betty Heinje who informed him that a physician (Dr. Van Veen) had told them of an altercation down there. Nelson recalled a meeting on January 24 with Grabicki in which it was decided "to investigate the situation." (This in contrast to Dean's testimony that the decision to terminate was made on January 23.) A memo in Lyon's personnel file (Resp. Exh. 7) confirms a telephone conversation between Dillingham and Dr. Van Veen on January 24 at 5 p.m. (which was after the two LPNs had been notified of their discharge).<sup>11</sup>

<sup>10</sup> While I can see some relationship between the two rules, the absence of some comment regarding "patients' rights" on the termination forms would seem to indicate that this was an afterthought and not part of the original reasoning by Respondent for the discharges.

<sup>11</sup> The document admitted into evidence was difficult to read, but merely indicates that Dr. Van Veen had "heard some nurses arguing in first floor medication room on 1/23/79. He heard something about . . ."

Grace Ellis claimed that her first knowledge of the incident came in a meeting attended by Grabicki, Nelson, and Dean after the noon hour on January 24. Ellis could not recall whether or not she had been asked what her feelings or recommendations were regarding the discharges. Although Ellis denied that she conducted any investigation regarding the incident, Sue Divine testified that she was asked by Ellis if she (Divine) knew anything about the conflict between Johnson and Lyon "concerning Mr. Tabert's chart." Divine then reported that she had heard Marcy tell Judy to make sure she had charted on Tabert, and Judy said she would and then left. Divine said later she had heard Barbara (Barton) suggest that "Marcy go put her arm around Judy and say that everything's o.k., just kind of try and make it up."

The union activities of both Johnson and Lyon were well known to Respondent. Both employees had received better than average evaluation reports prior to the advent of the Union. Johnson had been selected as employee of the month and employee of the year. While both employees had been counseled regarding a June incident, this could very well have been motivated more because of the subject matter of their discussion (the Union) rather than any commotion or disturbance it may have caused.<sup>12</sup> Moreover, in contrast to the reason given for the discharge—inability to cooperate with fellow employees—the testimony is quite clear that Johnson and Lyon were good friends and were quite capable of cooperating with one another.

The totally inadequate investigation of the January 23 incident prior to the decision to discharge Johnson and Lyon, the inconsistent reasons advanced for the discharges, the total failure to interview either Johnson or Lyon regarding the incident, the minimal disturbance created as testified to by Sue Divine, and the well-known active union participation by Johnson and Lyon have convinced me that the reasons advanced for the discharges of Johnson and Lyon were pretextual and the real reason was because of their union activity. I find that Johnson and Lyon were discharged in violation of Section 8(a)(3) and (1) of the Act.

The Freeburger-Jarvis discharges were an obvious attempt to give added emphasis to rule 18 with the hope or desire of masking the Johnson-Lyon discharges. Their conversation—which appeared to be such a startling event to Dean—went totally unnoticed by their immediate supervisor who was working at the charge nurse's office directly in front of the place where the incident occurred. Divine did not regard the conversation as unusual or other than normal. However, because it occurred at a time when the Johnson-Lyon incident was being "investigated" or "considered" it provided a convenient mask to hide the illegal discharges of the union activists—Johnson and Lyon. I believe this incident was seized upon by Respondent to give an "aura of legality" to the illegal discharges of Johnson and Lyon. As best reflected by the evidence, the incident was very minor and insignificant. There is no evidence that there was an

inability of the two employees involved to cooperate with one another. The contrary is true—both employees testified they were good friends and frequently visited each other outside working hours. I shall find the discharges of Freeburger and Jarvis to have been in violation of Section 8(a)(3) and (1) of the Act.<sup>13</sup>

### 3. The 8(a)(5) allegations

The essence of the General Counsel's allegations with regard to the 8(a)(5) violation is that Respondent deliberately, and with the intent of dissipating the bargaining unit, failed and refused to hire qualified LPNs since on or about September 8.

The proof unmistakably shows a gradual diminution of the employees in the LPN unit. The record is also clear that between September 26, 1978, and February 9, 1979, Respondent received applications from 13 individuals who were licensed practical nurses. However, the conclusion the General Counsel wishes to be drawn from these two established facts is highly speculative in view of Respondent's credited evidence.

Both Donald Nelson and Grace Ellis testified they were under instructions from Trudel Dean to hire LPNs. Nelson was under instructions to reduce the contract labor expense.<sup>14</sup> Numerous advertisements seeking to hire LPNs were placed in local newspapers by Respondent. Contacts with "sister" facilities were made in an effort to have any unwanted or unneeded LPNs referred to Madison South. Respondent did hire a few registered nurses during the critical period and the evidence is clear and convincing that the duties of the RNs and the LPNs were nearly identical and interchangeable.<sup>15</sup> The evidence is also quite clear and convincing that RNs were much more available and the number of applications from RNs were running nearly four to one over the number of LPN applications.

The use of contract labor was not a new procedure for Respondent. While it is true that the use of contract labor was heavier during this particular period of time, in my opinion it stemmed from Respondent's primary concern of getting the facility in a position to pass inspection by the State of Washington Department of Social and Health Services.<sup>16</sup> It was this intense preoccupation with getting the facility prepared for its next inspection that caused several supervisors from sister facilities to be working at Madison South.<sup>17</sup> In my opinion it

<sup>13</sup> While I believe the real reason for the discharges of Freeburger and Jarvis to have been an effort to mask the illegal discharges of Johnson and Lyon, as previously indicated herein, Grace Ellis was at least suspicious of Linda Freeburger's union activity.

<sup>14</sup> LPN contract labor cost Respondent \$2 per hour more than employee or payroll labor in the same classification.

<sup>15</sup> The RNs have received more extensive training and are qualified in some areas of rendering medication which the LPNs are not qualified to administer. However the salaries of RNs were generally a little greater than those of LPNs.

<sup>16</sup> The Madison South facility had received several inspections by the State Department of Health Services and were threatened with a loss of their license unless conditions were drastically improved. Their next inspection was expected in late January or early February 1979.

<sup>17</sup> Barbara Barton, Barbara Townsend, and Carolyn Cochran were all employed at other facilities operated by Danmor Company and were spending considerable time at Madison South during this critical period.

<sup>12</sup> Connie Gillespie received the identical counseling and there is absolutely no evidence that she participated in any way in the conversation other than having been in the same room with Johnson and Lyon.

was also the major concern of Grace Ellis who had the responsibility of interviewing and hiring the LPNs. Grace Ellis took the easy way out and turned to contract labor to fill needed replacements because it was the expedient thing to do and allowed her more time to devote to her primary task of getting ready for the inspection. Moreover, the proof does not show that the applicants were totally ignored. While Grace Ellis could not remember the specifics on each of the applicants, her testimony generally supports the fact that one of the applicants whom she might have desired to hire could not be contacted by telephone; some of the applicants were unwilling to work irregular hours or required a specific shift; others were lacking long-term care experience;<sup>18</sup> and still others were deficient in one area or another which indicated they were not qualified employees even though they may have had their license as a practical nurse.<sup>19</sup>

The General Counsel relies primarily on *Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977), aff'd. 586 F.2d 1300 (9th Cir. 1978), wherein the Board and court found respondent to have violated the Act by "unlawful interrogation of prospective employees" and "the outright refusal to hire individuals whose background indicated potential union adherence." However, these factors were not shown to exist in the instant case. The General Counsel has not shown one scintilla of evidence to connect the failure to hire LPNs with union animus on the part of Respondent. Nor has there been any showing that Respondent questioned or sought in any manner to ascertain the attitude of the applicants toward unionism. This is not a case where a respondent has been shown to have a strong antiunion attitude. While the evidence supports, and I sincerely believe, the propriety of finding discriminatory discharges and some wrongful questioning (as heretofore found), nevertheless these transgressions were not so outrageous and pervasive as to totally tarnish every act of Respondent. Any such inference arrived at "must be based upon evidence, direct or circumstantial, not upon mere suspicion." *Cedar Rapids Block Co., Inc. and Cedar Sand and Gravel Co. v. N.L.R.B.*, 332 F.2d 880, 885 (8th Cir. 1964); *Kings Terrace Nursing Home and Health Related Facility*, 229 NLRB 1180 (1977).

The General Counsel is required to prove a case by a preponderance of the evidence and this she has failed to do in connection with the alleged 8(a)(5) violation. I shall recommend dismissal of this aspect of the complaint.

#### IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

<sup>18</sup> This term was understood to be the difference between hospital experience and convalescent home experience.

<sup>19</sup> The unit was never totally dissipated. As can best be determined from the record there were four LPNs on Respondent's payroll at the time of the hearing.

Having found that Respondent unlawfully discharged Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger and failed to reinstate them, I shall recommend that Respondent offer to each of them immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. I shall also recommend that Respondent make them whole for any loss of earnings suffered as a result of the discrimination practiced against them by payment to them a sum of money equal to that which they normally would have earned as wages from the date of their termination to the date of said offers of reinstatement, less net earnings during such period. Backpay is to be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 190 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employee Glenda Freeburger concerning her and/or her fellow employees' union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By referring to Glenda Freeburger as a union agitator in response to a telephone call from a prospective employer, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1).
5. By discharging and refusing to reinstate Judy Johnson, Marcy Lyon, Judy Jarvis, and Glenda Freeburger because of their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
6. The following is an appropriate bargaining unit within the meaning of Section 9(b) of the Act:

All full-time and part-time licensed practical nurses and graduate practical nurses employed by Danmor Company at the Madison South Convalescent Center, but excluding all registered nurses, nursing assistants, dietary and housekeeping employees, physical therapy aides, laundry employees, maintenance employees, office clerical employees, professional employees, administrators, managers, confidential employees, guards and supervisors as defined in the Act.

7. All other allegations of the complaint not specifically found hereinbefore to be violative of the Act are to be dismissed.

[Recommended Order omitted from publication.]

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: On April 9, 1980, Administrative Law Judge James T. Rasbury of the National Labor Relations Board (herein called the Board) issued his Decision in the above-entitled proceeding (JD-(SF)-100-80), and, on the same date, the case was transferred to and continued before the Board. The Administrative Law Judge found that Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), and recommended that Respondent take certain steps to remedy the unfair labor practices found. However, the Administrative Law Judge recommended that the remaining allegations of the consolidated complaint be dismissed, including the allegation that Respondent had violated Section 8(a)(3) and (5) of the Act by the following conduct: failing to replace vacant unit positions with licensed practical nurse applicants in an attempt to dissipate the unit; contracting out unit work to undermine the Union's majority; and failing and refusing to hire 13 allegedly qualified named applicants for unit positions.

Thereafter, Respondent and the General Counsel filed timely exceptions and supporting briefs. Respondent also filed an answering brief.

On August 26, 1980, the Board issued an Order reopening the record and remanding the proceeding for further hearing before an administrative law judge<sup>1</sup> for the purpose of taking evidence *only* as to whether Respondent violated Section 8(a)(3) and (5) of the Act by the conduct set forth in the allegations described above. The matter was heard by me in Spokane, Washington, on March 17, 1981.

Upon the entire record, from my observation of the demeanor of the witnesses,<sup>2</sup> and having considered the post-hearing briefs, I make the following:

## FINDINGS OF FACT

## I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

On May 8, 1978, the Union filed a representation petition seeking an election among Respondent's service and maintenance employees which included nurses aides and orderlies. On June 27, 1978, an election was held under the supervision of the Regional Director for Region 19 of the Board. Timely objections to the conduct of the election were filed by the Union. A second election in the service and maintenance unit has not been held due to the pendency of the instant unfair labor practice charges. On May 15 the Union filed a petition in Case

19-RC-8892, seeking to represent Respondent's employees in the licensed practical nurse unit at issue herein:

All full-time and part-time licensed practical nurses and graduate practical nurses employed by the Danmor Company at the Madison South Convalescent Center, but excluding all registered nurses, nursing assistants, dietary and housekeeping employees, physical therapy aides, laundry employees, maintenance employees, office clerical employees, professional employees, administrators, managers, confidential employees, guards and supervisors as defined in the Act.

On August 16, the Regional Director certified the Union as the exclusive representative of Respondent's employees in the above-described bargaining unit, found to be appropriate within the meaning of Section 9(b) of the Act. Collective-bargaining negotiations in an effort to reach a collective-bargaining contract covering the licensed practical nurses' bargaining unit described above (LPN unit) commenced on October 24 and continued at least through the end of January 1979. The consolidated complaint does not allege that Respondent failed to bargain in good faith during negotiations.

The General Counsel contends that, following the certification of the Union as the exclusive bargaining representative in the LPN unit, Respondent attempted to evade its obligation to bargain with the Union by failing to hire replacements for vacant LPN positions in an attempt to dissipate the LPN unit. The General Counsel further alleges that, in order to avoid its obligation to bargain with the Union, Respondent contracted out unit work by using the services of nursing agencies rather than hiring LPNs and refused to hire 13 allegedly qualified named applicants for LPN positions. Respondent does not deny that the number of LPNs in its employ declined from eight in May 1978 to two—both of whom were on leaves of absence—in January 1979.<sup>3</sup> However, Respondent contends that its failure to hire LPNs resulted from external conditions beyond its control. In support of this argument Respondent presented evidence that its primary concern was to upgrade the facility so that it would not lose its license to operate in the State of Washington. Rather than hiring LPNs, Respondent hired registered nurses (RNs) and utilized nurses from contract labor agencies. The General Counsel and Respondent agree that the critical issue herein is the Respondent's motive for hiring RNs and utilizing contract labor rather than hiring LPNs.

B. *The Decline in the Number of LPNs*

In May 1978, at the time of the filing of the representation petition in the LPN unit, Respondent employed eight LPNs, seven full time and one part time. During the 6-month period from the election through January 1979, the number of LPNs in Respondent's employ decreased to two, both of whom were on leaves of absence. During the same time period, Respondent's com-

<sup>1</sup> Due to the death of Administrative Law Judge Rasbury, the case was remanded to another administrative law judge.

<sup>2</sup> The only witnesses to testify before me were 6 of the 13 named applicants for employment as licensed practical nurses. None of the witnesses who testified before Administrative Law Judge Rasbury were recalled to testify. The credibility findings herein are based on my review of the record evidence and the inferences fairly drawn therefrom. See *El Rancho Market*, 235 NLRB 468, 470 (1978).

<sup>3</sup> By the summer of 1979, and at the time of the initial hearing herein, there were four LPNs in Respondent's employ.

plement of RNs ranged from a low of 7 to a high of 15. There was extensive evidence, that with minor exceptions, LPNs and RNs performed virtually the same duties for Respondent.

During this critical time period, Respondent was preparing for an inspection by the State of Washington Department of Social Health Services. The Department of Health Services had threatened Respondent with the loss of its license unless conditions improved by its next inspection scheduled for late January or early February 1979. In preparing for this inspection, Respondent had some supervisors from sister facilities spend considerable time working at the Madison South Convalescent Center.

Concurrent with these events, as found by Administrative Law Judge Rasbury, Respondent discharged nurses aides Judy Jarvis and Glenda Freeburger, both members of the Union's bargaining team, on January 24, 1979, in violation of Section 8(a)(3) and (1) of the Act. On that same date, Respondent further violated Section 8(a)(3) and (1) of the Act by discharging LPNs Judy Johnson and Marcy Lyon in order to hide the illegal discharges of Jarvis and Freeburger. Further, Respondent engaged in the following conduct in violation of Section 8(a)(1) of the Act: interrogating employees concerning their union activities or interests; and labeling employees as "union agitators" in response to prospective employers' reference checks.

In support of its contention that Respondent sought to evade its obligation to bargain with the Union, the General Counsel relies on the following uncontradicted testimony of Larry Buchanan, a former nurses aide.<sup>4</sup> Just prior to the August 1978 election in the LPN unit, Buchanan had a conversation with Grace Ellis, then Respondent's director of nursing services, in which he asked Ellis whether she intended to replace two LPNs who had recently resigned. Ellis responded by saying that sort of thing was out of her hands, that it was not her responsibility, and that she had nothing to say about it. Buchanan commented that it did not look like Ellis was trying to replace those LPNs and Ellis agreed with that observation but said she, personally, had nothing to do with it. During September 1978, Buchanan asked Ellis if she were going to replace an LPN named Ruth Jones who had just been discharged for sleeping on the job. Ellis replied, "Probably not. I don't know, I don't think so." Buchanan said, "Well now, we've got a very interesting situation don't we? We're down to four, we're down to four LPN's where there used to be eight. And it's getting down to the wire, because Denise [another LPN] is pregnant, you know she will be leaving, and there is every probability that Connie [an LPN] will be leaving. That will leave two. That isn't much of a unit." Ellis agreed that it was not much of a unit.

<sup>4</sup> I credit Buchanan's testimony. Grace Ellis, formerly Respondent's director of nursing services, was called to testify by the General Counsel as an adverse witness and was not questioned on this matter. Respondent did not ask any questions of Ellis and she was not recalled to deny this testimony. From the failure to recall Ellis concerning these matters, I draw the inference that her testimony would not have been favorable to Respondent. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977).

Buchanan resigned from Respondent's employ on October 31, 1978. Thereafter, in January 1979, he called Ellis seeking to return to work. Ellis told Buchanan that he could "absolutely not" return to work. When Buchanan stated, "Why not? You have openings and I'm a good aide, you know that," Ellis then replied, "That's not the question." Several days later, Buchanan filled out a job application and presented it to Ellis. Ellis said, "You know I can't hire you. I've gotten instructions. I cannot hire you." Buchanan asked who had given those instructions and Ellis replied "I'll give you three guesses." When Buchanan guessed Mortimer (Respondent's president), Ellis replied, "You've got it." With that both Buchanan and Ellis laughed and Buchanan said, "I heard about Judy [Johnson] and Marcy [Lyon], and as far as I'm concerned you're in for the time of your lives." Ellis replied, "I know it. I think it's a horrible mistake, but I didn't have anything to do with it. That's all Mr. Nelson [Respondent's administrator] and I really don't have anything to say about anything around here anymore."<sup>5</sup> Ellis told Buchanan that she was unhappy with her job and that she intended to find another job. She said she was upset that she did not have a regular staff. Buchanan commented on the number of contract service nurses and the lack of employee LPNs. When Ellis agreed that there was a lack of LPNs, Buchanan said, "Well, you've got a hell of a bargaining unit here now. You lost your last 2 nurses, you can negotiate forever with what you've got left, which is nothing."

#### *C. The Failure To Hire the 13 Allegedly Qualified Job Applicants*

The General Counsel contends that Respondent's refusal to hire any or all of the 13 LPN applicants was part of a calculated and deliberate scheme to avoid its obligation to bargain with the Union by dissipating the LPN unit.<sup>6</sup> The General Counsel further contends that Respondent's animus is aimed at the Union rather than the individual applicants. Respondent contends that its failure to hire the 13 applicants for LPN positions was due to "objective nondiscriminatory criteria and circumstances and was not for the purpose of dissipating the bargaining unit or undermining the Union's majority."

The criteria for LPN hiring as testified to by Grace Ellis were possession of a valid Washington State license, long-term care experience as a licensed employee, and, if an individual had graduated before 1965, a certificate that he or she had taken pharmacology. Although indicating that there might be other criteria, Ellis could recall no other criteria. Ellis testified that she could not independently recall the reasons for the failure to hire any of the 13 applicants. However, she identified her

<sup>5</sup> The failure to rehire Buchanan was not alleged as a violation of the Act and is not before me on remand.

<sup>6</sup> The 13 allegedly qualified applicants for unit positions and dates of application are:

Francis L. Frederick, 9-26-78; Beverly Ann Riley, 10-18-78; June K. Zimmerman, 11-02-78; Russell K. Goo, 11-27-78; Patty Ann Colbert, 12-28-78; John Eugene Stormont, 1-05-79; Carol Palmer, 1-04-79; Vicky Renee Mostul, 1-08-79; Jacquelyn Jean Tilton, 1-23-79; Pamela Joleen Rowberry, 1-31-79; Theodore Q. Blasingame, 2-08-79; Teresa J. Blasingame, 2-08-79; and Shirley Kathleen Tock, 2-09-79.

written remarks on their job applications which gave abbreviated reasons for not hiring nine of the applicants.

*Frances L. Frederick*, an LPN, applied for work at Respondent's Madison South facility on September 26, 1978. No reason was offered for why Frederick was not hired except that Ellis noted that she had not interviewed Frederick. Ellis could not recall why Frederick was not interviewed.

*Beverly Ann Riley*, an LPN, filled out an application for employment on October 18, 1978, and was interviewed that same date by Ellis. Riley testified that she told Ellis that she could work any shift, and that she had worked in a hospital before, but did not give medications. Thereafter, Riley had no contact with Ellis but was subsequently dispatched by a contract service agency to work at Madison South as an LPN where she passed out medications. Ellis could not recall why she did not hire Riley. Respondent in its brief, relying on Ellis' written remarks on the job application, contends that Riley was not hired because she had no experience in giving medications and was rather unkempt. Respondent further argues that at the time of Riley's application no serious staffing problem existed. Finally, Respondent argues that Riley's experience was insufficient.

*June K. Zimmerman*, an LPN, applied for employment on November 2, 1978. Zimmerman had received clinical training at Madison South under the supervision of Ellis. Ellis told Zimmerman that there were no positions open during the shifts for which Zimmerman sought work.<sup>7</sup> Ellis told Zimmerman that she would be contacted if anything in her desired timeslot opened up. However, when Zimmerman contacted Ellis later to again inquire about a job, Ellis told Zimmerman that the applicant would not be hired due to her lack of experience. Ellis could not recall why Zimmerman was not hired but her notes indicated that Zimmerman wanted full-time work. In its brief Respondent contends that Zimmerman was not hired due to her lack of experience.

*Russell K. Goo*, an LRN, applied for employment on November 27, 1978. Goo testified that, at the time of his application, he was willing to work all hours and had nursing experience. Further Goo testified that he had geriatric training. Ellis offered no reason for not hiring Goo but said she was unable to contact him by telephone (presumably for an interview). Goo acknowledged that he was looking for employment and could have missed Ellis' call. In its brief Respondent contends that Goo lacked sufficient experience for employment.

*Patty Ann Colbert*, an LRN, applied for employment on December 28, 1978. Ellis testified that Colbert probably was not hired because she had a back injury. Colbert credibly testified that, at the time of her interview with Ellis, Ellis did not indicate that Colbert's back injury would prohibit her from being hired. Rather, Ellis told Colbert that she would be hired. Colbert was not later contacted. In its brief, Respondent contends that Colbert was not hired because she concealed the existence of her back injury and because of the injury itself.

<sup>7</sup> My review of the record indicates that positions were available during the shifts for which Zimmerman applied. Respondent was utilizing nurses from contract labor agencies for those shifts.

*John Eugene Storment* applied for employment on January 5, 1979, but had not worked as an LPN since 1974. Storment was in the process of renewing his license at the time of his application. Ellis noted on the job application that Storment did not have a current license. The General Counsel apparently argues that Storment could have obtained a license in time to be hired by Respondent. Respondent argues that Storment's disqualification from hire is patently obvious.

*Carol Palmer*, an LPN with more than 20 years' nursing experience, applied for employment on January 4, 1980. Palmer was interviewed by Ellis at the time of her application and told that she would be contacted. Palmer testified that, after Ellis failed to call, she attempted to call Ellis four times. Ellis never returned Palmer's calls. Ellis testified that she was interested in hiring Palmer, but that when she tried to contact Palmer by phone no one answered. Palmer credibly testified that someone was available to take phone messages at all times but that she received no messages. Ellis never explained why Palmer was not hired immediately or why Palmer was not contacted by mail. Nor did Ellis explain why she called Palmer only once. Respondent contends that Palmer was not hired because of the lack of a telephone and lack of long-term care experience.

*Vicky Renee Mostul* applied for employment and was interviewed by Ellis on January 8, 1979. Mostul informed Ellis that she had worked previously with geriatric patients as a student nurse and that she would work any shift. Ellis told Mostul that Respondent did not have an opening at that time but would have an opening within a couple of weeks because of "high turnover." Ellis told Mostul that she would call the applicant as soon as there was an opening. However, Mostul was not later contacted. Ellis testified, after reviewing the job application, that Mostul was not hired because of the lack of long-term care experience as an LPN.

*Jacquelyne Jean Tilton* was an LPN when she applied for employment on January 23, 1979. Tilton had 5 years' nursing experience and indicated that she was available for full-time work. Ellis could offer no reason for not hiring Tilton except that she had not interviewed Tilton. Ellis offered no reason why she had not interviewed Tilton. Respondent contends that Tilton was not hired due to a lack of long-term care experience.

*Pamela Joleen Rowberry*, an LPN, applied for employment on January 31, 1979. Ellis testified that, after reviewing Rowberry's application, Rowberry was not hired because she had been dismissed from another hospital for excessive absenteeism. Rowberry testified that she was interviewed by Ellis and told that all day-shift positions were filled at the time. Approximately 2 weeks later, Rowberry was working at Respondent's Madison South facility as a contract services employee during the day shift. Rowberry also worked the other two shifts during her assignment of approximately 3 weeks at Madison South.

*Theodore Q. Blasingame* and his wife, *Teresa J. Blasingame*, both LPNs, applied for employment on February 8, 1979. Neither Blasingame was interviewed by Ellis. Teresa Blasingame testified that she attempted to contact

Ellis for an interview but was unsuccessful in doing so. Ellis offered no reason for not hiring the Blasingames. She testified that at the time of their application for employment she was very busy with the upcoming state inspection. Respondent contends that Mr. Blasingame was not hired due to a lack of experience and that Mrs. Blasingame indicated a refusal to work irregular hours.

Shirley Kathleen Tock, an LPN, applied for employment on February 9, 1979. Tock did not testify. According to Ellis' remarks on Tock's job application, Tock did not appear for an interview. There is no evidence to contradict these remarks.

#### D. Respondent's Defense

Respondent's defense must be considered in the light of the General Counsel's *prima facie* evidence. Grace Ellis, Respondent's director of nursing services from July 1978 until February 1979, called as an adverse witness by the General Counsel, was not examined or recalled by Respondent. My review of the record indicates that Ellis was unable to recall most matters and seemed to be evasive and reluctant to testify.<sup>8</sup> Ellis testified that she was under instructions from Donald Nelson, Respondent's administrator, to hire LPNs and, in fact, told to hire any qualified applicant. She testified, however, that hiring LPNs was secondary to her concern for Respondent's potential loss of its state certification. She testified that, in January 1979, she was too busy with the state inspection to train employees and in February she was so busy that she "probably" did not have time to interview certain job applicants. Ellis never explained why she increased her use of contract labor services when instructed to do the opposite. Nor did she explain why she did not hire LPNs when instructed to do so. Further, Ellis could not recall why she did not hire the 13 named applicants for employment. From reviewing the job applications, Ellis had a reason for not hiring two of the applicants. But for the most part she had no memory and her written remarks were brief and not fully explained. For four of the employees, even utilizing the job applications, she could not recall a reason. Certain examples are most telling: With regard to applicant Carol Palmer, Ellis testified that she was interested in hiring Palmer and called to leave a message for Palmer, but no one answered.<sup>9</sup> However, no explanation was offered for why Palmer was not hired immediately, why Palmer's calls were not returned, or why Ellis did not send Palmer a wire or a letter. Applicant June Zimmerman was apparently not hired because she wanted full-time work. However, no explanation was offered as to why Zimmerman could not be offered full-time work. Respondent was utilizing RNs and LPNs from contract services during the hours that Zimmerman sought work. In its brief, Respondent argues that Zimmerman was inexperienced. However, Zimmerman had served in an intern program

<sup>8</sup> Administrative Law Judge Rasburry, apparently, credited those responses given by Ellis. On the other hand, I place particular importance on Ellis' failure to offer evidence on matters critical to the resolution of these issues.

<sup>9</sup> There is reason to doubt that Ellis in fact called Palmer as Palmer credibly testified someone was present at all times to take phone messages for her.

at Madison South. Moreover, that reason was not offered by Ellis.<sup>10</sup> The General Counsel also presented evidence that Madison North, Respondent's sister facility, hired an LPN in April 1979, who did not have long-term care experience—a requirement used to exclude applicants at Madison South. Most importantly, Ellis was not recalled to deny Buchanan's testimony regarding her instructions not to hire a regular staff of LPNs.

Donald Nelson, Respondent's administrator, testified that he was under instructions from Trudel Dean (then Respondent's operations manager) to reduce the contract labor expense and to "use his own people."<sup>11</sup> Nelson was never instructed to increase the number of RNs. However, between October 1978 and January 1979, Nelson participated in the hire of three RN's.<sup>12</sup> During the relevant time period at least five RNs were hired. Nelson, like Ellis, never explained why contract labor expenses increased in contradiction of management's instructions. Nelson never explained why the 13 applicants named in the complaint were not hired.

#### Analysis and Conclusions

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board announced the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>13</sup> As the parties agree and I find that the critical issue herein is Respondent's motivation for using contract labor services and not hiring LPNs, I find that the *Wright Line* test applies.

For the following reasons I find that the General Counsel has made a *prima facie* showing that Respondent was motivated by a desire to discourage membership in the Union and to erode the bargaining unit. Concurrent with the filing of the petition in the representation case, Respondent substantially increased its use of contract labor from one agency and began utilizing contract labor from a second agency. The timing of these events is an important factor in determining whether Respondent was motivated by its employees' protected conduct. Further, during this same time period, Respondent was engaged in substantial unfair labor practices. The unlawful discharges of two bargaining team members, Judy Johnson and Marcy Lyon, followed by the discharges of employ-

<sup>10</sup> No weight has been given to arguments in Respondent's pretrial brief regarding alleged deficiencies of job applicants which are not supported by Ellis' testimony.

<sup>11</sup> Contract labor cost Respondent \$2 per hour more than employee labor in the same classification. Nelson was also told by Respondent's counsel to hire LPNs so as not to appear to be deleting the unit.

<sup>12</sup> One of these RNs quit shortly after her hire. The two RNs replaced LPNs. Nelson testified that Respondent had job applications from approximately 50 RNs and approximately 20 LPNs.

<sup>13</sup> If after all the evidence has been submitted, the employer has been unable to carry its burden, the Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. *Id.* at fn. 11.

ees Glenda Freeburger and Judy Jarvis in order to hide the illegal discharge of Johnson and Lyon, establish that Respondent had embarked on a course of conduct aimed at discouraging employees from union activities. An inference can be drawn from such antiunion conduct that Respondent was similarly motivated in its use of contract labor.

I find it particularly significant that the use of contract labor was against Respondent's self-interest. Contract labor was more expensive. Both Nelson and Ellis were allegedly told to hire LPNs and reduce the cost of contract labor. However, rather than reduce such costs, Respondent increased its use of the more expensive contract labor services. Respondent would not have acted in this manner unless it had a reason. Respondent's failure to explain its reasons leads me to conclude that it had a reason which it desires to conceal—an unlawful and discriminatory one.

Contrary to Administrative Law Judge Rashbury, I do not find that Ellis took the easy way out and turned to contract labor because it allowed her more time to devote to her primary task of getting ready for the inspection. Ellis did not so testify. She only testified that in January 1979 she was so busy that she could "probably" not train employees. Ellis further testified that she probably was too busy in February to interview certain applicants. However, there is no basis to conclude that contract labor required less training or required less of Ellis' time. Rather, the frequent turnover of contract labor would require more training and supervision. Further, two of the LPN applicants, allegedly not qualified, were sent by nursing agencies to work for Respondent as contract labor. There is no evidence that those two nurses were given any additional training. Moreover, Respondent did hire RNs and there is no reason to believe that RNs needed less training or required less of Ellis' time than LPNs.

Finally, the undenied admissions made by Ellis to Buchanan establish that Respondent knew that the unit was being dissipated. Ellis further admitted to Buchanan that she was instructed not to hire applicants regardless of their qualifications. This evidence was not rebutted or explained.

The lack of reasons for failing to hire the named applicants further supports the establishment of the General Counsel's *prima facie* case. Carol Palmer, concededly qualified, was allegedly not hired because no one answered one phone call. No effort was made to write her or call her again. June Zimmerman was not hired because she allegedly wanted full-time work, but there was no evidence that full-time work was not available. Rather it appears that contract labor was being used during the work hours for which Zimmerman was seeking employment. Further, no attempt was made to interview five of the applicants.

I find that the timing of the increase in the use of contract labor shortly after the filing of the petition and concurrent with substantial unfair labor practices, the use of a more expensive alternative to hiring LPNs for unit positions, and the admissions of Buchanan and Respondent's failure to offer a plausible explanation for its conduct establish the General Counsel's *prima facie* case.

Thus, the burden shifts to Respondent to come forward with a business justification for its failure to fill vacant unit positions with licensed practical nurse applicants.

As stated earlier, Respondent contends that its failure to hire LPNs resulted from external conditions beyond its control. First, Respondent asserts that it has always been easier to hire RNs than LPNs in the nursing home field. There is some evidence to support that argument. Secondly, Respondent contends that its hiring problems were compounded by its threatened decertification by the State Department of Social Health Services. This contention is no doubt true. However, neither argument explains Respondent's conduct in failing to avail itself of a qualified applicant when such a person applied for work. Thirdly, Respondent argues that there was no economic incentive for Respondent to avoid or minimize the use of staff LPNs; to the contrary, there was a very strong economic disincentive to doing so. As discussed above, it is this economic disincentive which casts serious suspicion on Respondent's conduct and which must be explained by Respondent.

Respondent contends that it took strong, affirmative action to attempt to maintain its LPN staffing during the critical time period herein. While Respondent did place extensive advertising in local papers to attract applicants, no attempt at hiring has been shown. Rather, evidence has been shown that Ellis was instructed not to hire unit applicants regardless of qualifications. Moreover, Respondent cannot adequately explain why it did not hire at least some of the applicants. While certain of the LPN applicants may not have met nondiscriminatory standards, it appears that all were disqualified regardless of qualifications. As stated earlier, I am not impressed by reasons offered in brief which were not advanced by Respondent's witnesses. The failure to hire LPNs does not appear to be directed at any of the applicants or the union activities of any applicant but rather at the Union. Thus, I do not find it persuasive that none of the applicants were questioned about their union sympathies.

Based on the above analysis, I am not persuaded that Respondent's conduct in not filling vacant LPN positions and not hiring LPNs would have taken place in the absence of its employees' union activities. If Respondent had evidence to support its defense, it should have presented such. I find that Respondent has not rebutted the *prima facie* case and, therefore, that Respondent had violated Section 8(a)(3) of the Act.

As found above, Respondent's failure to fill vacant LPN positions was motivated by its reaction to its employees' activities in bringing in the Union. Whether Respondent was further attempting to dissipate the unit or undermine the Union's majority is not clear. However, dissipation of the unit and the undermining of the Union were reasonable expectations from Respondent's conduct. Ellis conceded as much to Buchanan. Thus, I find that Respondent's conduct violated Section 8(a)(5) as well as Section 8(a)(3) of the Act.

Respondent further argues that: (1) the Board cannot determine which applicants are qualified for LPN positions, and (2) it has not been shown that vacancies exist for all of the discriminatees. *Alexander Dawson, Inc.*,

*d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165, 179 (1977).<sup>14</sup> The Administrative Law Judge quoting *Shawnee Industries, Inc., subsidiary of Thiokol Chemical Corporation*, 140 NLRB 1451, 1452-53 (1963), stated:

Under the Act an Employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently, the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act, and the question of job availability is relevant only with respect to the employer's backpay obligation.

Having failed to consider any of the applicants because of reasons prescribed by the Act, Respondent must show that an applicant would not have been hired even in the absence of such unlawful reasons. It has sustained that burden only with regard to two of the applicants: John Eugene Storment and Shirley Kathleen Tock. Storment did not have a valid state license and Tock did not appear for her interview. With regard to the 11 remaining applicants, Respondent has failed to establish that they were not qualified for employment had their applications been lawfully considered. Determination of job availability and possible backpay liability will be properly left to the compliance stage of this proceeding. *Alexander Dawson, supra*, 228 NLRB at 179; *Apex Ventilating Co., Inc.*, 186 NLRB 534, fn. 1 (1970).

#### CONCLUSIONS OF LAW

1. By failing to replace licensed practical nurses, by increasing its use of contract labor services, and by refusing to consider job applicants for positions as licensed practical nurses, for the purpose of dissuading its employees from supporting the Union and/or for the purpose of dissipating the bargaining unit or undermining the Union's majority status, I find Respondent violated Section 8(a)(5), (3), and (1) of the Act.

2. By engaging in a pattern or practice of refusing to hire applicants for employment, regardless of qualifications, in order to discourage its employees from supporting the Union, I find that Respondent discriminated in regard to the hire of Frances L. Frederick, Beverly Ann Riley, June K. Zimmerman, Patty Ann Colbert, Russell K. Goo, Carol Palmer, Vicky Renee Mostul, Jacquelyn

Jean Tilton, Pamela Joleen Rowberry, Theodore Q. Blasingame, and Teresa J. Blasingame, thereby discouraging membership in the Union and, accordingly, I find that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. The evidence establishes that Respondent would not have hired John Eugene Storment and Shirley Kathleen Tock even in the absence of its unlawful motives described above.

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that Respondent unlawfully discriminated against Francis L. Frederick, Beverly Ann Riley, June K. Zimmerman, Russell K. Goo, Patty Ann Colbert, Carol Palmer, Vicky Renee Mostul, Jacquelyn Jean Tilton, Pamela Joleen Rowberry, Theodore Q. Blasingame, and Teresa J. Blasingame with respect to their applications for employment, it will be required to offer them employment in the same position in which they would have been hired absent the discrimination against them, in the order that it would have employed them absent any discriminatory considerations, discharging, if necessary, any employees hired after the dates of their applications. In the event that there are insufficient positions for all the discriminatees, the reinstatement offers will be made in chronological order according to the date of application. With regard to those discriminatees not receiving an offer, Respondent will be required to place their names on a preferential hiring list and offer them the first such positions that become available, in which it would have employed them absent any discriminatory conditions. It will be further recommended that Respondent be required to make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment in the manner outlined above, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>15</sup>

[Recommended Order omitted from publication.]

<sup>14</sup> Enfd. 586 F.2d 1300 (9th Cir. 1978).

<sup>15</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). See also *Olympic Medical Corporation*, 250 NLRB 146 (1980).